

PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 104]

Vegetable Marketing and Research Program

The Department of Agriculture (Department) proposes to amend Chapter 104, Subchapter D (relating to Vegetable Marketing and Research Program) to read as set forth in Annex A.

Authority

This proposed rulemaking is authorized under 3 Pa.C.S. §§ 4501—4513 (relating to Agricultural Commodities Marketing Act) (act). Section 4511 of the act (relating to rules and regulations for enforcement) authorizes the Secretary of Agriculture (Secretary) to promulgate regulations and establish penalties as necessary to enforce the provisions of an agricultural commodity marketing program established under the act, including the Pennsylvania Vegetable Marketing and Research Program (Program).

Need for this Proposed Rulemaking

The Program exists and operates under a Program Order published at 44 Pa.B. 6565 (October 11, 2014) that was issued by the Secretary following a referendum conducted by the Department among affected Pennsylvania vegetable growers. In that referendum, a majority of those growers, representing a majority of vegetable production, voted to establish the Program in accordance with the Program Order. The Program is the subject of a review referendum among these vegetable growers at intervals of no more than 5 years.

The Program focuses on vegetable producers (affected producers) in this Commonwealth who in a given calendar year grow and market: 1) 1 acre or more of vegetables; 2) 1,000 square feet or more of greenhouse vegetables; or 3) \$2,000 or more worth of vegetables. The Program requires that these producers pay a production-based assessment (producer charges) to support the vegetable marketing and vegetable research efforts of the Program. This collective effort allows the vegetable production industry in this Commonwealth, which is primarily comprised of small farms, to fund marketing and research projects that these small farms would not individually be able to fund, and that are of broad benefit to the vegetable production industry in this Commonwealth.

The Department administers the Program. The Department estimates that over half of affected producers who are required to pay producer charges to help support the Program do not. There are about 1,600 affected producers supporting the Program while there are about 1,700 who are either unaware of the Program or who have been able to avoid paying their fair share to support the marketing and research efforts of the Program. Against this backdrop, this proposed rulemaking is needed to: 1) relieve certain vegetable sales agents of the obligation to verify that affected producers with which they transact business have paid their producer charges to the Program or to collect those charges on behalf of the Program; 2) create a simple process by which vegetable sales agents can respond to requests from the Department for information to help identify these affected producers and their veg-

etable production; 3) establish a \$25 civil penalty with respect to affected producers who do not account for and pay their producer charges to the Program by January 31 each year; and 4) accomplish a general “housekeeping” update to reflect the experience the Department has gained in administering the Program and Chapter 104, Subchapter D over the years.

The Department is satisfied there is a need for this proposed rulemaking and that it is otherwise consistent with Executive Order 1996-1, “Regulatory Review and Promulgation.”

Summary of this Proposed Rulemaking

Proposed amendments to § 104.52 (relating to definitions) delete the definition of “collecting sales agent” since this proposed rulemaking no longer requires sales agents to collect producer charges on the Program’s behalf. The definition of “growing season” is proposed to be deleted and replaced with “marketing season,” a term used in the Program Order. The definition of “producer” is proposed to be amended to align it with the Program Order’s definition of this term. This proposed rulemaking adds a definition of “vegetable production unit,” a term used in proposed amendments to § 104.53 (relating to producer charges), which is the basic unit upon which producer charges would be calculated.

Proposed amendments to § 104.53 clarify how producer charges owed to the Program are to be calculated and introduce the new term “vegetable production unit.” Proposed amendments also present the option for an affected producer to pay producer charges equaling the lesser of: 1) \$25 plus \$1.50-per-vegetable-production-unit exceeding five vegetable production units; or 2) 1.25% of gross sales of vegetables during the marketing season, but no less than \$25. This second option was established in the Program Order published at 44 Pa.B. 6563 (October 11, 2014), but had not been codified in this section.

Proposed amendments to §§ 104.54 and 104.55 (relating to accounting, payment and verification procedures; and responsibilities of the producer) simplify and streamline the process by which affected producers are required to account for their vegetable production and pay the appropriate producer charge to the Program. These producers would complete a simple assessment statement form, calculate producer charges due the Program, and submit that form and payment by January 31 of the year immediately following the year in which the vegetables were produced.

Proposed amendments to § 104.56 (relating to responsibilities of the sales agent) lighten the regulatory burden placed on approximately 25 of the approximately 150 vegetable sales agents, relieving them of any responsibility for documenting an affected vegetable producer’s vegetable production or collecting producer charges on the Program’s behalf. This proposed rulemaking would replace this with a straightforward requirement that, upon the request of the Department, a sales agent identify producers from whom the sales agent purchased \$2,000 or more worth of vegetables in a single marketing season (a calendar year). The Department may follow-up and require the sales agent to provide the exact dollar value of the subject vegetables, which would help the Department in calculating the producer charges the affected producer owes the Program.

Proposed amendments to § 104.57 (relating to penalties for noncompliance) delete language referencing and regarding “collecting” sales agents. The current \$300 civil penalty that may be assessed against a sales agent that fails to comply with this section is not proposed to be amended. Proposed amendments add a \$25 civil penalty that may be assessed against producers who do not file their assessment statement forms and producer charges with the Program by the January 31 annual filing deadline.

Persons Likely to be Affected

This proposed rulemaking is not expected to have an adverse impact on any group or entity. It is codifying an existing requirement that affected producers pay producer charges to support the Program.

The vegetable production industry in this Commonwealth is largely comprised of thousands of small family farms. There are approximately 3,300 vegetable producers who would be affected by this proposed rulemaking. Of these, about 1,600 vegetable producers are currently reporting their vegetable production and paying producer charges to support the Program, while approximately 1,700 vegetable producers are either unaware of the Program or are evading its requirements. This is unfair to participating producers and has the Program operating with less than half the funds it should be collecting and directing to its marketing and research efforts. This proposed rulemaking seeks to remedy this situation by allowing the Program to more readily identify those vegetable producers who should be helping to support the Program's efforts.

Of the approximately 150 vegetable sales agents in this Commonwealth, about 25 are currently required to obtain vegetable production information from producers with which they transact business and collect producer charges on the Program's behalf. This proposed rulemaking would relieve these sales agents of that burden and require that, upon request of the Department, a sales agent provide the name and address of any producer from which it purchases \$2,000 or more worth of vegetables in a specific calendar-year marketing season. The Department believes it can use this information to identify vegetable producers who should be participating in the Program, secure their participation, apply the Program to all affected vegetable producers, and increase the breadth, depth, quality and impact of the Program's marketing and research efforts.

The Program allows vegetable growers in this Commonwealth to collectively fund and conduct: 1) generic promotion of Pennsylvania grown vegetables; and 2) practical vegetable production research. These efforts benefit all vegetable producers and the industries in this Commonwealth (such as farm equipment suppliers, fertilizer suppliers, and the like) that support these producers, and help provide the public with fresh, nutritious locally-produced vegetables. Also, several researchers at agricultural colleges and universities (such as The Pennsylvania State University) will benefit from the increased funding that this proposed rulemaking is expected to generate for the Program's vegetable research and marketing efforts.

The public also has an indirect interest in the continued vitality of the Program. A vibrant and prosperous Pennsylvania vegetable industry boosts the economy in this Commonwealth and also provides the public with the benefits of a fresh, nutritious, locally-produced vegetable supply. These benefits cannot be quantified.

Fiscal Impact

Commonwealth

This proposed rulemaking will not have appreciable fiscal impact upon the Commonwealth.

Political subdivisions

This proposed rulemaking will not have appreciable fiscal impact on political subdivisions.

Private sector

This proposed rulemaking will have some positive fiscal impact upon the private sector. Since only about half (1,600 of 3,300) of affected vegetable producers currently participate in the Program and this proposed rulemaking would bring the other half (approximately 1,700 of 3,300) into the Program, the Department estimates the amount of producer charges the Program collects each year will roughly double, to approximately \$250,000 per year. To the extent this proposed rulemaking helps swell the numbers of affected producers who participate in the Program, and helps fully-fund the Program's vegetable marketing and research efforts, it will have a net positive fiscal impact on vegetable producers in this Commonwealth and the industries that support them, such as farm equipment suppliers and the like. The fully-funded vegetable marketing and research projects are expected to provide vegetable producers information that will help them more efficiently grow and market their vegetables.

General public

This proposed rulemaking will not have appreciable fiscal impact on the general public, although to the extent this proposed rulemaking helps maintain a vital vegetable production industry in this Commonwealth the general public will benefit from a ready supply of locally-grown nutritious vegetables. This benefit cannot be quantified.

Paperwork Requirements

This proposed rulemaking will simplify the paperwork requirements imposed on vegetable producers by requiring a single, annual accounting and payment. It would also eliminate reporting requirements (and the attendant paperwork) currently imposed on approximately 25 vegetable sales agents. It will not appreciably impact the Department's paperwork load.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 5, 2017, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Department, the General Assembly and the Governor.

Effective Date

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

Sunset Date

There is not a sunset date for this proposed rulemaking. The Department will review the efficacy of these regulations on an ongoing basis.

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to William Troxell, Director, Pennsylvania Vegetable Marketing and Research Program, Department of Agriculture, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 694-3596 within 30 days of the publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

Contact Person

The contact person for technical questions regarding this proposed rulemaking is William Troxell, Director, Pennsylvania Vegetable Marketing and Research Program, Department of Agriculture, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 694-3596.

RUSSELL C. REDDING,
Secretary

Fiscal Note: 2-185. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART IV. BUREAU OF MARKET DEVELOPMENT

CHAPTER 104. ENFORCEMENT OF MARKETING PROGRAMS

Subchapter D. VEGETABLE MARKETING AND RESEARCH PROGRAM

§ 104.51. Scope.

This subchapter establishes the procedures by which vegetable producers shall account for and pay the producer charges owed the Program. **[Depending upon the type of sales agent involved in marketing a producer's vegetables, the producer shall either account for and pay the producer charges directly to the Program or through the sales agent.]**

§ 104.52. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Auction—A market where producers provide vegetables in wholesale quantities to be auctioned to wholesale buyers.

[Collecting sales agent—A processor, auction, packing house or cooperative which is located in this Commonwealth and which handles, processes, receives, sells or contracts to sell vegetables originating from a producer.]

Cooperative—A sales agent that markets fresh market vegetables on behalf of two or more producers, and which is owned by the producers for which it markets vegetables.

Fresh market vegetables—Vegetables that have not been processed and that are marketed to persons other than processors.

[Growing season—The period from October 15 of a calendar year through October 14 of the following calendar year.]

Greenhouse—

(i) An enclosed structure for growing vegetables, including structures where the internal temperature is controlled or high tunnels where additional heat is not supplied.

(ii) The term does not include low tunnels.

Marketing season—The period from January 1 through December 31 of each calendar year.

Packing house—A facility that receives, washes, grades, packages or packs fresh market vegetables produced by a person other than the owner or operator of that facility.

Person—An individual, firm, corporation, association or other business unit.

Processing—The operation of preserving vegetables for storage by canning, dehydrating, freezing, grinding, crushing, packaging or other means.

Processor—A person who engages in processing.

Producer—[A person who grows 1 or more acres of vegetables within this Commonwealth for the purpose of selling the vegetables. The term also includes persons who grow vegetables in greenhouses located within this Commonwealth if the following exist:

(i) The greenhouse grows vegetables in 1,000 square feet or more of growing space.

(ii) The vegetables are grown for sale.

(iii) The vegetables are not grown to be transplanted outdoors.]

A person who does one or more of the following during a particular marketing season:

(i) Grows 1 acre or more of vegetables in this Commonwealth for the purpose of selling the vegetables.

(ii) Grows vegetables in one or more greenhouses in this Commonwealth if all of the following are accurate:

(A) The greenhouse grows vegetables in 1,000 square feet or more of growing space.

(B) The vegetables are grown for sale.

(C) The vegetables are not grown to be transplanted outdoors.

(iii) Grows vegetables in this Commonwealth and sells \$2,000 or more of the vegetables grown in a given marketing season.

Program—The Pennsylvania Vegetable Marketing and Research Program.

Sales agent—A processor, auction, packing house, fresh market vegetable stand, cooperative, broker, wholesaler, commission merchant or another person who purchases, handles, processes, receives, sells or contracts to sell vegetables originating from a producer. A person may be a sales agent with respect to vegetables of the person's own production.

Vegetable production unit—A unit equal to 1 acre of field vegetable production or 1,000 square feet of greenhouse vegetable production sold in a single marketing season.

Vegetables—Vegetables except Irish potatoes. The term includes: asparagus, beans (snap, dry and lima), beets,

cabbage, cauliflower, broccoli, Brussels sprouts, collards, kale, mustard greens, kohlrabi, carrots, celery, corn (sweet, pop and ornamental), cucumbers, eggplant, garlic, horseradish, leeks, lettuce, muskmelons, watermelon, onions, parsley, parsnips, peas, peppers, pumpkins and squash (edible or decorative), gourds, radishes, rutabagas, spinach, sweet potatoes, tomatoes and turnips produced in this Commonwealth for the purpose of sale by a producer.

Verification—A written statement of fact made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

§ 104.53. **Producer charges.**

[The producer charges owed the Program shall be a fee of \$25 per producer plus \$1.50 per acre for each acre over 10 acres in vegetable production and \$1.50 per 1,000 square feet for each 1,000 square feet over 10,000 square feet in greenhouse vegetable production. Producer charges shall accrue on a growing season basis.]

(a) A producer owes a producer charge to the Program each marketing season. The producer charge is the lesser of the following:

(1) A flat fee of \$25, plus \$1.50 for each vegetable production unit exceeding five vegetable production units.

Example: A grower conducts field vegetable production on 10 acres of land and also has 6,000 square feet of greenhouse vegetable production. This means the grower's vegetable production occurs on a total of 16 vegetable production units (10 of which are attributable to the 10 1-acre units devoted to field vegetable production and 6 of which are attributable to the 6 1,000-square-foot units devoted to greenhouse vegetable production). The \$1.50-per-vegetable-production-unit producer charge does not apply to the first 5 of these 16 vegetable production units, but applies to the remaining 11. The producer charge is \$41.50, calculated by adding (the flat fee of \$25) plus (11 vegetable production units) multiplied by \$1.50 per vegetable production unit).

(2) An amount equal to 1.25% (0.0125) of gross sales of vegetables during a particular marketing season, but no less than \$25.

(b) Producer charges may be changed by subsequent amendment of the Program in accordance with the referendum procedures [set forth] in Chapter 103 (relating to referendums).

§ 104.54. **Accounting, payment and verification procedures.**

[(a) *Production verification statement.* The Program will provide a producer or collecting sales agent with production verification statement forms with which to verify the acreage, or the square-footage, in the case of greenhouse-grown vegetables, of vegetables which the producer raises within a particular growing season. A production verification statement form shall bear a unique serial number and shall require the following information of a producer completing the form for the first time within a particular growing season:

(1) The name and address of the producer.

(2) The name and address of the collecting sales agent, if the form is to be submitted to the Program through a collecting sales agent.

(3) The number of acres of vegetables raised by the producer for processing or fresh market use within the growing season, or other time period designated by the Program, if applicable.

(4) The square footage of greenhouse-grown vegetables raised by the producer within the growing season, or other time period designated by the Program.

(5) The calculation of the amount of producer charges owed the Program by the producer.

(6) The date upon which the form was completed.

(b) *Subsequent production verification statements filed within the same growing season.* A production verification statement form shall require the following information of a producer who has already completed a production verification statement form within that same growing season:

(1) The name and address of the producer.

(2) The serial number of the first production verification statement form completed by the producer within that same growing season.

(3) The name and address of the collecting sales agent, if the form is to be submitted to the Program through a collecting sales agent.

(4) The date upon which the form was completed.

(c) *Circumstances under which no production verification statement form is required.* If a producer has completed a production verification statement form, whether the original form described in subsection (a) or the abbreviated form described in subsection (b), and has submitted it to the Program through a collecting sales agent, that producer need not complete further production verification statement forms with respect to vegetable transactions with that particular collecting sales agent during that particular growing season.

(d) *Deadline for collecting sales agents.* A collecting sales agent shall submit a production verification statement or producer charge which it collects on the Program's behalf by mailing or delivering the same to the Program within 30 days from the time that the collecting sales agent receives the production verification statement and deducts the producer charges reflected on the production verification statement from proceeds otherwise due the producer, or by October 31 immediately following the applicable growing season, whichever occurs first.

(e) *Deadline for producers.* A producer which does not submit a production verification statement and payment of producer charges through a collecting sales agent shall mail or deliver them to the Program by October 31 immediately following the applicable growing season.

(f) *Form of payment.* Whether the payments are made directly to the Program by the producer or are deducted by a collecting sales agent, payments of producer charges shall be by check or money order made payable to the "PA Vegetable Marketing and Research Program."

(g) *Address.* Production verification statements and payments of producer charges shall be mailed or delivered to:

Department of Agriculture
Bureau of Market Development
Attn: Pennsylvania Vegetable Marketing and
Research Program
2301 North Cameron Street
Harrisburg, Pennsylvania 17110-9408]

(a) *Assessment statement.* The Program will provide producers with assessment statement forms with which to verify the acreage, or the square footage in the case of greenhouse-grown vegetables, of vegetables which the producer raises within a particular marketing season. The Program will provide these forms upon request and make these forms available for producers to download from the Program's web site at www.paveggies.org. An assessment statement form will require the following information of a producer with respect to each marketing season:

(1) The name, address and telephone number of the producer.

(2) The marketing season with respect to which the form is submitted.

(3) The number of acres of vegetables raised by the producer for processing or fresh market use and sold within that marketing season.

(4) The square footage of greenhouse-grown vegetables raised by the producer and sold within that marketing season.

(5) The calculation of the amount of producer charges owed the Program by the producer.

(6) The date upon which the form was completed.

(7) A verification, signed by the person submitting the form, confirming the accuracy of the information provided.

(b) *Deadline for producers.* A producer shall mail or deliver to the Program a completed assessment statement form and any producer charges due the Program no later than January 31 immediately following the applicable marketing season.

(c) *Form of payment.* Payments of producer charges shall be by check or money order made payable to "PA Vegetable Marketing and Research Program."

(d) *Address.* Assessment statement forms and payments of producer charges shall be mailed or delivered to:

Department of Agriculture
Bureau of Market Development
Attn: Pennsylvania Vegetable Marketing and
Research Program
2301 North Cameron Street
Harrisburg, Pennsylvania 17110-9408

§ 104.55. Responsibilities of the producer.

It is the responsibility of the producer to submit a complete [**production verification statement**] **assessment statement form**, as described in § 104.54 (relating to accounting, payment and verification procedures), and the appropriate producer charge owed the Program. [**This material shall be submitted to the Program either directly by the producer or through**

a person who is a collecting sales agent with respect to the producer's vegetables.] The producer shall retain a copy of any [**production verification**] **assessment statement form** which is submitted to the Program for at least [**2 growing seasons beyond the growing**] **two marketing seasons beyond the marketing** season with respect to which the form is submitted.

§ 104.56. Responsibilities of the [**collecting**] sales agent.

[(a) *Compliance.* It is the responsibility of a collecting sales agent to require a producer with which it transacts business as a sales agent to submit a completed production verification statement form, as described at § 104.54(a) and (b) (relating to accounting, payment and verification procedures) to the collecting sales agent, unless the producer has submitted a production verification statement form to that collecting sales agent earlier in the same growing season. A person other than a collecting sales agent may not collect producer charges or production verification statement forms on the Program's behalf. The collecting sales agent shall deduct the producer charges reflected on the production verification statement form from proceeds otherwise due the producer. The collecting sales agent shall provide a copy of the completed production verification statement form to the producer and shall retain a copy for its records. The collecting sales agent shall mail or deliver to the Program the original of the production verification statement form, along with the payment of producer charges reflected on the statement form.

(b) *Records.* A collecting sales agent shall retain a copy of any production verification statement form which is received from a producer for at least 2 growing seasons beyond the growing season with respect to which the form was received.]

(a) *Providing basic producer information.* The Department may issue a sales agent a written notice that the sales agent is to provide the Department the name and address of each producer from which the sales agent purchased \$2,000 or more worth of vegetables in a given marketing season. If the Department issues a written notice, the sales agent shall provide the requested information to the Department within 30 days of the date of the written notice.

(b) *Providing production value information.* After the Department has issued a sales agent the written notice described in subsection (a), the Department may follow-up with a subsequent notice that the sales agent is to provide the Department the dollar value of vegetables purchased in a given marketing season from any of the producers identified in the sales agent's initial response to the Department under subsection (a). If the Department issues a follow-up notice, the sales agent shall provide the requested information to the Department within 30 days of the date of the follow-up notice.

§ 104.57. Penalties for noncompliance.

(a) [*Collecting sales*] *Sales agents.* If a [**collecting**] sales agent fails to comply, or fails to comply completely or fails to comply with this subchapter within

the time specified, the Department may bring a civil action in the appropriate magisterial district seeking a penalty of at least \$100 but not more than \$300[, plus the payment of producer charges owed]. [Any penalty sought by the Department will be in addition to payment of delinquent producer charges.]

(b) *Producers.*

(1) ***Failure to mail or deliver assessment statement form and payment by January 31.*** If a producer fails to mail or deliver an assessment statement form and the required payment of producer charges to the Program by the January 31 immediately following the applicable marketing season, as required under § 104.54 (relating to accounting, payment and verification procedures), the producer owes a penalty of \$25. The \$25 penalty is in addition to the producer charges owed and any penalty imposed under paragraph (2).

(2) ***Penalty.*** If a producer fails to comply, or fails to comply completely or fails to comply with this subchapter within the time specified, the Department may bring an action in the appropriate magisterial district seeking a penalty of at least \$100 but not more than \$500, plus payment of producer charges owed. If the producer owes producer charges, the Department will seek a penalty as nearly equivalent to 100% of the delinquent amount as is practicable. A penalty sought by the Department will be in addition to payment of delinquent producer charges.

[Pa.B. Doc. No. 17-1730. Filed for public inspection October 20, 2017, 9:00 a.m.]

SUSQUEHANNA RIVER BASIN COMMISSION

[25 PA. CODE CH. 801]
General Policies

Summary: This document contains proposed rules that would codify in the regulations and strengthen the Susquehanna River Basin Commission's (Commission) Access to Records Policy providing rules and procedures for the public to request and receive the Commission's public records.

Dates: Comments on the proposed rulemaking may be submitted to the Commission on or before November 13, 2017. The Commission has scheduled a public hearing on the proposed rulemaking on November 2, 2017, 2:30 p.m. to 5 p.m. or at the conclusion of public testimony, whichever is sooner.

Addresses: Comments may be mailed to: Jason E. Oyler, Esq., General Counsel, Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788, or by e-mail to regcomments@srbc.net. The public hearing is located in Harrisburg, Pennsylvania, State Capitol (East Wing, Room 8E-B), Commonwealth Avenue, Harrisburg, PA 17120.

Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

For Further Information Contact: Jason E. Oyler, Esq., General Counsel, telephone: (717) 238-0423, ext. 1312;

fax: (717) 238-2436; e-mail: joyler@srbc.net. Also, for further information on the proposed rulemaking, visit the Commission's website at <http://www.srbc.net>.

Supplementary Information:

The Commission has long made its records available to the public but it has never formalized its open records policy in regulation. The Commission first promulgated its "Freedom of Information Policy" on January 11, 1979. As an interstate compact agency, no single member jurisdiction may subject the Commission to its open records law. See *C.T. Hellmuth & Associates v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408 (D. Md. 1976) (holding that Maryland could not unilaterally subject transit authority to the provision of the Maryland Public Information Act). In recognition of this limitation, the Commission developed its policy "in line with Freedom of Information legislation enacted by all four signatory jurisdictions." See Minutes of Commission Meeting (Jan. 11, 1979). As noted in the January 11, 1979, meeting minutes of the Commission, the Policy "merely formalized the current Commission practice of making its records available to the furthest extent possible."

The Commission updated its open records policy on September 10, 2009, by adopting its "Access to Records Policy," Policy No. 2009-02 on September 10, 2009. This policy replaced the 1979 Freedom of Information Policy. The updated policy reflected the practice of the Commission's member jurisdictions, recognized records in electronic format as being subject to public access and added a formal procedure for the protection of confidential information submitted by project sponsors and a procedure for the public to challenge the designation of this information as confidential. This revised policy also provided that the Commission "will endeavor to make as much information as possible available on its website. . . ., in an effort to eliminate the need for many records requests." For example, the Commission provides all of its approved dockets on its website, as well as information summaries for each docket or project application pending before the Commission, policies, reports, publications and data from its water quality monitoring programs.

The Commission believes the results of this policy have been successful. From 2012 through 2016, the Commission provided records to 152 distinct records requests in writing for documents data or information, as well as innumerable informal requests. The Commission website has been a well-used public resource and repository for records. In the past 12 months, the Commission website has received 121,213 visits from 26,522 unique visitors. The Commission Water Application and Approval Viewer, where the public can view Commission dockets and pending application information, was recently upgraded to increase its functionality and ease of use and received 16,593 unique page views over the past 12 months. Similarly, the Commission water quality network data landing page received 9,904 unique page views over this same time period.

The Commission wishes to continue this long tradition of transparency by further formalizing the key elements of its Access to Records Policy in duly promulgated regulations. The Commission is not looking to replace the policy, but rather to memorialize the key tenets of the policy in regulation. Through this action, the Commission will be codifying its commitment to public access to records in a way that imbues them with the status of law that can be enforceable against the Commission.

The Commission's 2009 Access to Records Policy can be found at: http://www.srbcc.net/pubinfo/docs/2009-02_Access_to_Records_Policy_20140115.pdf. The Commission's current records processing fee schedule can be found at: <http://www.srbcc.net/pubinfo/docs/RecordsProcessingFeeScheduleUpdatedAddress.pdf>.

List of Subjects in 18 CFR Part 801

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR part 801 as follows:

PART 801—GENERAL POLICIES

1. The authority citation for part 801 shall be amended to read as follows:

Authority: Secs. 3.1, 3.4, 3.5(1), 15.1 and 15.2, Pub.L. 91-575 (84 Stat. 1509 et seq.)

2. Add § 801.14 to read as follows:

§ 801.14 Public Access to Records.

(a) *Purpose.* The Commission, as an independent compact agency, is not subject to any of its member jurisdictions' laws regarding public access to records. Nevertheless, the Commission wishes to assure, to the maximum extent practicable, the availability of Commission records consistent with the Susquehanna River Basin Compact. The Commission shall maintain an "Access to Records Policy" that outlines the details and procedures related to public access to the Commission's records. Any revisions to this policy shall be consistent with this section and undertaken in accordance with appropriate public notice and comment consistent with requirements of 18 CFR § 808.1.

(b) *Scope.* This section shall apply to all recorded information, regardless of whether the information exists in written or electronic format. There is a strong presumption that records shall be public, except where considerations of privacy, confidentiality, and security must be considered and require thoughtful balancing. The Commission shall identify types of records that are not subject to public access, including but not limited to:

- (1) Personnel or employment records;
- (2) Trade secrets, copyrighted material, or any other confidential business information;
- (3) Records exempted from disclosure by statute, regulation, court order, or recognized privilege;
- (4) Records reflecting internal pre-decisional deliberations;
- (5) Records reflecting employee medical information, evaluations, tests or other identifiable health information;
- (6) Records reflecting employee personal information, such as social security number, driver's license number, personal financial information, home addresses, home or personal cellular numbers, confidential personal information, spouse names, marital status or dependent information;
- (7) Investigatory or enforcement records that would interfere with active enforcement proceedings or individual due process rights, disclose the identity of public

complainants or confidential sources or investigative techniques or endanger the life or safety of Commission personnel; or

(8) Records related to emergency procedures, facilities or critical infrastructure.

(c) *Procedures.* The Access to Records Policy will detail the necessary procedures for requesting records and processing records requests.

(1) Requests shall be in writing and shall be reasonably specific;

(2) The Commission shall identify an Access to Records Officer to handle requests;

(3) The Commission shall respond to a records request within a reasonable time and in consideration of available resources and the nature of the request;

(4) The Commission shall not be required to create a record that does not already exist, or to compile, maintain, format or organize a public record in a manner in which the Commission does not currently do so;

(5) A procedure shall be identified for electronic transfer, copying or otherwise providing records in a manner that maintains the integrity of the Commission's files;

(6) A procedure shall be identified for handling review of requests that seek access to information that has been identified as confidential and for notifying the person(s) who submitted the confidential information that it is subject to a records request.

(d) *Fees.* The Commission shall adopt and maintain a "Records Processing Fee Schedule." The fees shall be calculated to reflect the actual costs to the Commission for processing records requests and may include the costs of reproducing records and the cost to search, prepare and/or redact records for extraordinary requests.

(e) *Appeals.* Any person aggrieved by a Commission action on a records request shall have 30 days to appeal a decision in accordance with 18 CFR § 808.2.

Dated: October 5, 2017.

ANDREW D. DEHOFF,
Executive Director

Fiscal Note: 72-14. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IV. SUSQUEHANNA RIVER BASIN COMMISSION

CHAPTER 801. GENERAL PROVISIONS

§ 801.14. Incorporation by reference.

The regulation set forth in 18 CFR 801.14 (relating to public access to records) is incorporated by reference and made part of this title.

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